Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

Timothy J. Grendell and Gerald W. Phillips,
Petitioners,

v.

The Ohio Supreme Court, et al.,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do attorneys regularly practicing and presently appearing before the highest court in a state have standing to facially challenge that state court's rule sanctioning attorneys for attorney fees without any notice and hearing or right to be heard when those attorneys will be effectively denied even the slightest chance of any review of such judicial punitive action because of the Rooker-Feldman doctrine and 28 U.S.C. § 1257?

PARTIES TO THE PROCEEDING

Petitioners

Timothy J. Grendell, and Gerald W. Phillips

Respondents

The Ohio Supreme Court, Thomas Moyer in his official capacity as Chief Justice of the Ohio Supreme Court, Alice Robie Resnick, in her official capacity as Justice of the Supreme Court of Ohio, Deborah L. Cook, in her official capacity as Justice of the Supreme Court of Ohio, Andrew Douglas, in his official capacity as Justice of the Supreme Court of Ohio, Francis E. Sweeney, in his official capacity as Justice of the Supreme Court of Ohio, Evelyn Lundberg Stratton, in her official capacity as Justice of the Supreme Court of Ohio, and Paul E. Pfeifer, in his official capacity as Justice of the Supreme Court of Ohio.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF CASE 3

ARGUMENT FOR GRANTING THE WRIT 5

ARGUMENT 1
Attorneys regularly practicing and presently appearing before the highest court in a state have standing to **facially** challenge the highest court's rule sanctioning attorneys for attorney fees without any notice and hearing 10

ARGUMENT 2
The Ohio Supreme Court Rule XIV, § 5 is unconstitutional **on its face** because it fails to provide or require the basic constitutional protections of notice and hearing prior to its *sua sponte* imposition of sanctions upon attorneys practicing before that court 12

ARGUMENT 3
Attorneys who, regularly and presently appear before the highest court in a state because of a loophole in the law created by the *Rooker-Feldman* doctrine and 28 U.S.C. § 1257, will be precluded from obtaining any facial review of the constitutionality of Supreme Court Rule XIV (5) 18

CONCLUSION 20

APPENDIX

Appendix A
Sixth Circuit Opinion, 6-5-01 . . . . . 1a

Appendix B
District Court Decision and Opinion, 11-5-99 . . . . . 19a

Appendix C
Ohio Supreme Court Rule XIV (5) 39a

Appendix D
Ohio Revised Code § 2323.51 . . . . . 40a

Appendix E
Federal Civil Rule of Procedure 11 . . . . . 47a

Appendix F
United States Court of Appeals Sixth Circuit Rule 46 . . . . . 51a

TABLE OF AUTHORITIES

Cases

Basista v. Weir, 340 F.2d 74 (3rd Cir. 1965) 15

Board of Regents of State Colleges v. Roth,
408 U.S. *564* (1972) 15

City of Chicago v. Morales,
427 U.S. 41(1999) 4, 17, 19

District of Columbia Court of Appeals vs. Feldman,
460 U.S. 462 (1983) . . . . . passim

Donaldson v. Clark,
819 F.2d 1551 (11th Cir. 1987) 6, 12, 13

F.T.C. v. Alaska Land Leasing, Inc.,
799 F. 2d. 507 (9th Cir. 1986) 7, 13

Fuentes v. Shevin, 407 U.S. 67 (1983) 14

Loudermill v. Cleveland Board of Education,
470 U.S. 532 (1985) 15

Miranda v. Southern Pacific Trans. Co. ,
710 F. 2d 516 (9th Cir. 1983) 7, 13

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 12

NRA vs. McGaw, 132 F. 3d 272 (6th Cir. 1997) 10

O'Shea vs. Littleton, 414 U.S. 488 (1974) 5, 10, 12

Richards v. Jefferson, 517 U.S. 793 (1996) 14

Roadway Express, Inc. vs. Piper,
447 U.S. 752, 100 S Ct 2455 (1980) . 5, 8, 13, 14

In re Ruben, 825 F.2d 977 (6th Cir. 1987) 5, 12, 14

Scheiderer &Assoc. vs.. *City of London*,
81 Ohio St.3d 94, 689 N.E.2d 252 (1998) . . . 16

Simmerman v. Corino,
27 F.3d 58 (3rd Cir. 1994) 6, 12, 13

State ex rel Grendell v. Davidson,
86 OS 3rd 629, 716 N.E. 2d 704 (1999) 14

State ex rel Krebs v. Christiansen,
88 OS 3rd 313, 725 N.E. 2d 663 (2000) 14

United States v. Salerno,
481 U.S. 739 (1987) 3, 4, 17

Statutes

Ohio Supreme Court Rule XIV (5) . . . . . passim

Ohio Revised Code §2323.51 . . . . . 14 , 15, 16

Federal Civil Rule of Procedure 11 . . . . . 15, 16

28 U.S.C. §1257 . . . . . passim

United States Court of Appeals Circuit Rule 46 7

United States Constitution,
14th Amendment 1, 19, 20

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 252 F. 3d 828 (2001). A copy of the Opinion is included in the Appendix at Appendix A at 1a-18a. The Opinion and Judgment of the District Court for the Northern District of Ohio is unpublished and is included in Appendix B at 19a-38a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued and filed its Opinion on June 5, 2001. This Petition for Writ of Certiorari is filed within 90 days of the issuance and filing of the Sixth Circuit's decision. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254 (1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution
Amendment XIV, §1
Due Process Clause

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution
Amendment V
Due Process Clause

No person shall be held to answer for a capital or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or liberty; nor shall be compelled in any criminal case to be a witness against himself, nor **deprived of life, liberty, or property without due process of law**; nor shall private property be taken for public use, without just compensation.

Ohio Supreme Court
Rule XIV(5)
Sua Sponte Sanction Rule

Frivolous Actions; Sanctions.

If the Supreme Court, on motion or on its own initiative, determines that an appeal or other action is frivolous or is prosecuted for delay, harassment, or any other improper purpose, it may impose, on the person who signed the appeal or action, a represented party, or both, appropriated sanctions, including an award to the opposing party of reasonable expenses, reasonable attorney fees, costs or double costs, or any other sanction considered just. An appeal or other action shall be considered frivolous if it is not reasonably well grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

STATEMENT OF THE CASE

Convicted murderers in the State of Ohio enjoy more due process protection than attorneys practicing before the Ohio Supreme Court. In fact, under Ohio Supreme Court Rule XIV (5) attorneys practicing before the Ohio Supreme Court can be **sua sponte** punished by the Ohio Supreme Court **without notice and without a hearing or even the right to respond**. Murderers can at least seek federal court intervention by habeas corpus. The *Rooker-Feldman* doctrine **precludes** collateral federal relief to Ohio attorneys who have been ambushed, like Petitioners, by the Ohio Supreme Court.

Petitioners in this case, two licensed practicing attorneys regularly practicing before the Ohio Supreme Court, who also had cases pending before the Ohio Supreme Court when this action was filed, who withdrew from cases before the Ohio Supreme Court, and who were already victims of the Ohio Supreme Court Rule XIV (5), brought this action **facially** challenging that rule based on its obvious **constitutional due process defects**—an utter lack of notice and the right to be heard before being judicially punished.

The federal district court correctly found that the Petitioners have standing, but erroneously held that even though Rule XIV (5) has a complete absence of notice and hearing on its face it was constitutional because "Nothing in the Rule prohibits the Supreme Court from providing notice or an opportunity to be heard to an attorney before sanctions may issue. This Court concludes that the Rule therefore survives a facial challenge so long as the challenged Rule **does not prevent** the Supreme Court of Ohio from providing notice and an opportunity to be heard." The District Court misapplied the "as applied" test set forth in *United States v. Salerno* 481 U.S. 739 (1987) to the pure facial challenge in

this case. The District Court went far beyond the terms on the face of the rule, to state that **the Rule does not prevent the Supreme Court of Ohio from applying an unconstitutional rule on its face, in a constitutional manner,** thus, in essence, somehow curing the constitutional deficiencies readily apparent on its face by subsequent unrequired corrective action. With the District's Court misapplication of the *Salerno* test, you **never** can have any successful constitutional facial challenges because there is always the hope or possibility that someone would ignore the express unconstitutional terms on the face of the rule and still somehow apply it in a constitutional manner. The District Court's erroneous application of an "as applied" test to a facial constitutional challenge eliminates facial challenges of the constitutionality of laws and rules, forcing all individuals to test their constitutionality by being actually exposed to the threat of sanctions. The test set forth in *Salerno*, to apply to "valid facial rule challenges", has all but been overruled. *City of Chicago v. Morales* 527 U.S. 41, 119 S. Ct. 1849, 144 L.Ed. 2d 67 (1999) Fn22 ("To the extent we have consistently articulated a clear standard for facial challenges, it is **not** the *Salerno* formulation, which has never been the decisive factor in **any** decision of this Court, including *Salerno* itself").

The Sixth Circuit Court of Appeals adeptly ducked the merits of this constitutionally significant case by reversing the federal district court's correct ruling recognizing Petitioners' standing as attorneys practicing before the Ohio Supreme Court with full present exposure to the impact of Rule XIV (5)'s lack of notice and hearing constitutional deficiencies. The Sixth Circuit reached its erroneous standing ruling by essentially holding that **only** an Ohio attorney who admittedly filed a frivolous Ohio Supreme Court action and therefore was exposed to imminent sanctions under Rule XIV (5), could

have any standing to bring an action challenging that patently unconstitutional rule. The Sixth Circuit's ruling flies in the face of common sense and federal jurisprudence. A party does **not** have to self-destruct under an unconstitutional law or rule to challenge it's constitutionality. *O'Shea vs. Littleton*, 414 U.S. 488, 495-96 (1974), *District of Columbia Court of Appeals vs. Feldman*, 460 U.S. 462 (1983). Rather, parties such as Petitioners, merely must be exposed to the "continuing, present adverse effects" of the rule, the enforcement and sanctions under the unconstitutional proscription of the rule, to have standing to bring a **facial** challenge of its unconstitutionality.

Moreover, as more fully discussed below, the lower court's rulings in this case are in conflict with the decisions of other circuits.

ARGUMENT FOR GRANTING THE WRIT

As to the merits of this case, there is no question that the **total absence** of any notice or hearing right (even a minimum right to respond) renders Ohio Supreme Court Rule XIV (5) **unconstitutional on its face**. The district court's ruling in this case flies in the face of this Court's rulings on due process and nullifies this Court's ruling in *Roadway Express, Inc. vs. Piper*, 447 U.S. 752, 100 S Ct 2455 (1980), and *In Re Ruben*, 825 F 2d 977 (1987) within the Sixth Circuit.

This case is a matter of first impression and unique constitutional significance throughout the United States. The constitutional integrity of state legal systems is at stake. How can there be a justice system, if state supreme courts have the unfettered right to violate the basic constitutional due process principles of notice and a right to be heard before sanctions

are adjudicated? If this Court fails to step in and preclude such unconstitutional state supreme court practices, the cancer spawned by Ohio Supreme Court Rule XIV (5) will likely spread and fatally infect the justice system throughout the United States.

Furthermore, this Court has yet to pass upon the question of what kind of **particularized notice** must be given. The Third Circuit Court of Appeals, has held what constitutes particularized notice. *Simmerman vs. Corino*, 27 F. 3d 58 (3rd Cir. 1994) As held by the *Simmerman* Court:

> With regard to the notice component, however, we have held the mere existence of the rule doe not satisfy the requirement. **The party sought to be sanctioned is entitled to particularize notice including, at a minimum,** 1) the fact that Rule 11 sanctions are under consideration, 2) the reasons why sanctions are under consideration, and 3) the form of sanctions under consideration. Only with information can a party respond to the court's concerns in an intelligent manner.

In *Donaldson v. Clark,* 819 F. 2d 1551 (11th Cir. 1987), the Eleventh Circuit held that due process requires that an attorney have fair notice of possible sanctions and the reason for their imposition. 819 F. 2d at 1560. The *Donaldson* court supported this holding with the rationale that it would be difficult for an attorney to respond to a court's reasons for considering sanctions without knowing what those reasons are (e.g. bad faith, improper purpose). *Id.*

The Ninth Circuit has also recognized the need for "particularized notice". Due process further requires that parties subjected to sanctions have "sufficient opportunity to demonstrate that their conduct was not undertaken recklessly or willfully" *F.T.C. v. Alaska Land Leasing, Inc. 799 F. 2d. 507, 510 (9th Cir. 1986).* At a minimum, due process requires an opportunity to prepare a defense to explain the questionable conduct at a hearing. *Miranda v. Southern Pacific Trans. Co. , 710 F. 2d 516, 522 (9th Cir. 1983).*

The Sixth Circuit's own rules explicitly provide for such particularized notice Cir. Rule 46 (See Appendix F), but yet that same court dodges for sanctioning attorneys appearing before that court explicitly the due process issue in this case by its erroneous ruling on standing; thereby completely avoiding the constitutional deficiencies in Rule XIV (5) as evidenced by the Sixth Circuit's own rules. This Court must address the issue of particularized notice because it is of great extreme importance to the legal system. Parties and their attorneys are continuously, regularly and constantly exposed to the threat of sanctions by the courts. They need judicial intervention on this matter to preserve the integrity of our legal systems and the basic constitutional due process procedural safeguards of notice and an opportunity to be heard. This Court must look towards the doctrine of federalism to step in and prevent the highest court of the State of Ohio from violating the basic constitutional rights of citizens of the United States.

The Petitioners, attorneys Timothy J. Grendell and Gerald W. Phillips, as well as **all** attorneys before the Ohio Supreme Court, on account of a loophole in the law created by the *Rocker-Feldman* doctrine and 28 U.S.C. § *1257,* will be precluded from obtaining any review of the constitutionality of the sanctions that can be imposed upon

them by the Ohio Supreme Court, *sua sponte,* without any notice or any hearing on the record. The likelihood of this Court accepting an appeal of such a sanction ruling by the Ohio Supreme Court is a statistical nullity.

This case provides this Court the opportunity to establish the priority between the plenary power of courts to control the conduct of attorneys appearing before it and the constitutional due process requirements of notice and hearing. While this Court has already definitively stated that notice and hearing are essential constitutional prerequisites to attorney sanctions, see, *Roadway Express, Inc. v. Piper,* 447 U.S. *752,* 767 (1980) ("Like other sanctions, attorney's fees certainly should not be assessed lightly or without notice and an opportunity for a hearing on the record."), Rule XIV (5) promulgated by the Ohio Supreme Court, under which attorneys Greindell and Phillips were sanctioned without notice and hearing presents several novel federal questions for this Court.

Petitioners do **not** ask this Court merely to reiterate its opinion on the fundamental safeguards required by the due process clause. This Court has already definitively stated that attorney's fees cannot be imposed without notice and a hearing. See, *Roadway Express, Inc. v. Piper,* 447 U.S. *752,* 767 (1980) ("Like other sanctions, attorney's fees certainly should not be assessed lightly or without notice and an opportunity for a hearing on the record."). Rather, Petitioners seek an opinion on four **novel**, federal constitutional questions of **first impression**.

1. Should a state supreme court have the **unrestricted** power to sanction attorneys *sua sponte,* without any required notice or a reasonable opportunity to respond, under a practice rule that severely limits or entirely precludes

constitutional review of that judicial sanction decision by any other court?

2. Does a state supreme court, in effectively preventing any other court from reviewing the constitutionality of a rule which it promulgated and which it enforces, violate long-cherished principles of federalism?

3. Can a state supreme court, in a non-judicial, rule making, administrative proceeding adopt a practice rule designed to eliminate the constitutional due process requirements of notice and a meaningful opportunity to be heard prior to imposing attorney sanctions?

4. What process is due with regard to attorney sanctions (i.e. what form of notice and hearing are required of a court before it can sanction an attorney)?

A review of these important, novel federal questions of general importance through out the United States will be precluded by this Court if it elects not to grant Petitioners' Writ of Certiorari.

Murderers receive their day in court before they are executed. Fundamental constitutional due process dictates that attorneys receive some minimum notice and the right to be heard before they are professionally executed. Ohio Supreme Rule XIV (5) deprives Ohio attorneys of these fundamental constitutional rights.

For these reasons, this Court should grant certiorari and accept this case so that this Court can address these **novel** federal constitutional issues of **first impression** and the conflicts between jurisdiction as to particularized notice in attorney sanction cases. This Court often grants convicted

murderers multiple opportunities for review. Attorneys, such as Petitioners, should at least be afforded one opportunity to appear before this Court to address the unconstitutional professional death sentence awaiting them under Ohio Supreme Court Rule XIV, §5.

ARGUMENT 1

Attorneys regularly practicing and presently appearing before the highest court in a state have standing to **facially** challenge the highest court's rule sanctioning attorneys for attorney fees without any notice and hearing.

The undisputed facts in this case are that the Petitioners are attorneys at law licensed in the State of Ohio, practicing regularly and on a continuous basis before the Ohio Supreme Court, and they were **presently** practicing before the Ohio Supreme Court. Petitioner Timothy J. Grendell even withdrew from two pending cases before the Ohio Supreme Court because of the imminent threat of the harm and injury and the existing harm and injury already suffered. The District Court correctly ruled that the Petitioners **have standing** to facially challenge the constitutionality of Rule XIV (5). *O'Shea vs. Littleton*, 414 U.S. 488, 495-96 (1974), *District of Columbia Court of Appeals vs. Feldman*, 460 U.S. 462 (1983) (holding that legal standing exists when parties are exposed to "continuing, present adverse effects" of the bar rule). The harm the Petitioners have suffered from the unconstitutional sanctioning power and its "chilling effect" like "the sword of Damocles" hanging over their heads ever time they appear in the Ohio Supreme Court under Ohio Supreme Court Rule XIV (5) is actual, real, and imminently threatening. *NRA vs. McGaw*, 132 F. 3d 272 (6th Cir. 1997) (holding that standing has been met when there is a showing

of actual present harm, or a significant possibility of future harm.)

The harm was **not** speculative, imaginary, or mere conjecture. It was real and actual for practicing attorneys earning part of their livelihood before the Ohio Supreme Court. The Petitioners were **not** non-litigation attorneys, who do not practice before the Ohio Supreme Court. The Petitioners were **not** attorneys, who do only occasionally practice before the Ohio Supreme Court. The Petitioners were **not** attorneys who were not before the Ohio Supreme Court. The Petitioners were **not** attorneys who had never been exposed to the unconstitutional sanctions of Rule XIV (5). The Petitioners were **not** attorneys who did not have to withdraw from present cases because of the fear of the unconstitutional sanctioning under Rule XIV (5). For, those other types of attorneys the harm would be speculative, imaginary, or mere conjecture, but **not** for the Petitioners. The hanging of "the sword of Damocles" hanging over Petitioners heads and its chilling effects were present, impending, real, existing, and a **true reality**. The Petitioners are subject to the **"continuing, present adverse effects"** of the unconstitutional rule. If the Petitioners do not have standing then who could ever meet the Sixth Circuit's test for standing to bring a facial challenge.

The Sixth Circuit Court of Appeals ducked the merits of this constitutionally significant case by reversing the federal district court's correct ruling recognizing Petitioners' standing as attorneys practicing before the Ohio Supreme Court with full present exposure to the impact of Rule XIV (5)'s lack of notice and hearing constitutional deficiencies. The Sixth Circuit reached its erroneous standing ruling by essentially holding that **only** an Ohio attorney who **admittedly filed** a frivolous action and therefore was exposed to

imminent sanctions under Rule XIV (5) could have any standing to bring the action challenging that patently unconstitutional rule. The Sixth Circuit's ruling flies in the face of common sense and federal jurisprudence. A party does **not** have to self-destruct under an unconstitutional rule to challenge it on its face. *O'Shea vs. Littleton*, 414 U.S. 488, 495-96 (1974), *District of Columbia Court of Appeals vs. Feldman*, 460 U.S. 462 (1983). Rather, parties such as Petitioners, merely must be exposed to the "continuing, present adverse effects" of the rule, the enforcement and sanctions under the unconstitutional proscription of the rule, to have standing to bring a facial challenge of its unconstitutionality. Contrary to the Sixth Circuit's evasive decision, Petitioners **have standing** in this case.

ARGUMENT 2

The Ohio Supreme Court Rule XIV, § 5 is unconstitutional **on its face** because it fails to provide or require the basic constitutional protections of notice and hearing prior to its *sua sponte* imposition of sanctions upon attorneys practicing before that court.

What forms of notiee and hearing are required by the due process clause with respect to the imposition of attorney sanctions by a state supreme court? This question has been addressed by several circuits. See, e.g., *Simmerman v. Corino,* 27 F.3d 58 (3rd Cir. 1994); *In re Ruben,* 825 F.2d 977 (6th Cir. 1987); *Donaldson v. Clark,* 819 F.2d 1551 (11th Cir. 1987). It has **not** been addressed, however, **by this Court**. This Court has generally required that, with respect to traditional adjudication, notice and hearing are required before any deprivation of an interest protected by the due process clause. See, *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950).

In *Roadway Express v. Piper,* this Court stated, "Like other sanctions, attorney's fees certainly should not be assessed lightly or without notice and an opportunity for a hearing on the record." 447 U.S. at 767. Although this Court has never specifically expressed the form of notice and hearing required by the due process clause in this context, several circuits have expounded on this subject.

In *Simmerman v. Corino,* the Third Circuit held that the due process clause required that an attorney facing *sua sponte* sanctions from a court be afforded particularized notice, including, at a minimum, (1) the fact that sanctions are under consideration, (2) the reasons why sanctions are under consideration, and (3) the form of sanctions under consideration, in order to allow the attorney to respond in an intelligent manner. 27 F. 3d at 64.

In *Donaldson v. Clark,* the Eleventh Circuit held that due process requires that an attorney have fair notice of possible sanctions and the reason for their imposition. 819 F. 2d at 1560. The *Donaldson* court supported this holding with the rationale that it would be difficult for an attorney to respond to a court's reasons for considering sanctions without knowing what those reasons are (e.g. bad faith, improper purpose). *Id.*

The Ninth Circuit has also recognized the need for "particularized notice." Due process further requires that parties subjected to sanctions have "sufficient opportunity to demonstrate that their conduct was not undertaken recklessly or willfully" *F.T.C. v. Alaska Land Leasing, Inc. 799 F. 2d. 507, 510 (9th Cir. 1986).* Due process requires opportunity to prepare a defense to explain the questionable conduct at a hearing. *Miranda v. Southern Pacific Trans. Co. , 710 F. 2d 516, 522 (9th Cir. 1983).*

The Sixth Circuit has paralleled the Third, Ninth and the Eleventh Circuits but it has **not** particularized the type of notice needed: "The imposition of attorney's fees must be reversed because the sanctioned person never had an adequate opportunity for a hearing on the record." *In re Ruben,* 825 F.2d 977, 985 (6th Cir. 1987), citing *Roadway Express,* 447 U.S. at 767. "It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin,* 407 U.S. 67, 80 (1983). "The right to be heard ensured by the guarantee of due process has little reality or worth unless one is informed that the matter is pending, and can chose for himself to appear or default, acquiesce, or contest." *Richards v. Jefferson,* 517 U.S. 793, 799 (1996).

Rule XIV, § *5* was designed to circumvent the safeguards of O.R.C. § 2323.51, and it has been applied by the Ohio Supreme Court in that instance for that specific purpose against the Petitioners *State ex rel Grendell v. Davidson* 86 OS 3rd 629, 716 N.E. 2d 704 (1999). The Ohio Supreme Court through the exercise of its "on its own initiative" and "sua sponte" provisions under Rule XIV (5) has proceeded without notice and a meaningful opportunity to be heard to once again sanction an attorney. *State ex rel Krebs v. Christiansen* 88 OS 3rd 313, 725 N.E. 2d 663 (2000). It was applied, moreover, with the intent of preventing any review of this decision by any other court, as discussed above.

The imposition of sanctions upon an attorney, whether in the form of attorney's fees or otherwise, puts a cloud over the attorney's good name, and consequently, his ability to earn a livelihood. This Court has often held that notice and an opportunity to be heard are essential where the government puts a person's good name, reputation, honor or integrity at

stake. See, e.g., *Board of Regents of State Colleges v. Roth,* 408 U.S. *564,* 573 (1972) A deprivation or impact upon one's means of livelihood has frequently been recognized as a severe impairment. *Loudermill v. Cleveland Board of Education,* 470 U.S. 532, 543 (1985).

Each day that cloud hangs over that attorney, without any indication from a higher court that the cloud may not be warranted, the attorney continues to suffer ongoing, irreparable harm. This cloud can **only** be removed by the highest court of this country, the United States Supreme Court. Without this Court's intervention, the reputations of attorneys the Petitioners may be damaged beyond repair. Last, the violation of one's constitutional rights always is **per se** irreparable harm. *Basista v. Weir,* 340 F.2d 74 (3rd Cir. 1965).

Can a state supreme court in a non-judicial rule making administrative proceeding adopt a practice rule designed to eliminate the constitutional due process requirements of notice and a meaningful opportunity to be heard prior to the imposition of attorney sanctions? The Ohio Supreme Court, by its surprise, *sua sponte* sanctioning of attorneys, without any notice or an opportunity for a hearing, pursuant to Supreme Court Practice Rule XIV, § *5,* rather than under one of the two provisions usually cited as authority for such sanctions, O.R.C. § 2323.51 and Civ. R. 11, has effectively adjudicated that the constitutional requirement of notice need **not** be given and that a hearing on the record need **not** be afforded to an attorney before he or she can be sanctioned by that court. The Ohio Supreme Court has made itself prosecutor, judge, and jury. The *Rooker-Feldman* doctrine and 28 U.S.C. §1257 have made that court's *sua sponte* sanctions of attorneys untouchable.

The Ohio Supreme Court adopted Ohio Supreme Court Practice Rule XIV, § 5 in a non-judicial proceeding on March 31, 1997 (effective April 28, 1997). That rule effectively eliminates the constitutional requirements of notice and a hearing on the record provided by O.R.C. § 2323.51 and Civ. R. 11. This elimination, however, directly contradicts rulings previously rendered by that Court confirming the constitutionality of O.R.C. § *2323.51* and Civ. R. 11. Virtually each and every one of the justices who voted to sanction attorneys Grendell and Phillips in utter disregard of the fundamental requirements of due process has authored opinions construing the validity of O.R.C. 2323.51 and its adherence to the requirements of the due process clause. See, e.g., *Scheiderer &Assoc.* vs.. *City of London,* 81 Ohio St.3d 94, 689 N.E.2d 252 (1998) (Chief Justice Moyer).

The logical conclusion to be inferred from these opinions is irrefutable. Ohio Supreme Court Practice Rule XIV, § *5* was promulgated, and has been invoked in these instances, to relieve the Ohio Supreme Court from having to abide by the constitutional due process guidelines imposed upon it by the Ohio Legislature and the United States Constitution. That result is what this case, ultimately, is all about. That, and the fact that the *Rooker-Feldman* doctrine and 28 U.S.C. §1257 virtually assure that no court will review a *sua sponte* sanction decision rendered pursuant to Ohio Supreme Court Practice Rule XIV, § *5.*

The federal district court correctly found that the Petitioners have standing, but erroneously held that even though Rule XIV (5) has a complete absence of notice and hearing on its face it was constitutional because "Nothing in the Rule prohibits the Supreme Court from providing notice or an opportunity to be heard to an attorney before sanctions may issue. This Court concludes that the Rule therefore

survives a facial challenge so long as the challenged Rule **does not prevent** the Supreme Court of Ohio from providing notice and an opportunity to be heard." The District Court misapplied the "as applied" test set forth in *United States v. Salerno* 481 U.S. 739 (1987) to the pure facial challenge in this case. The District Court went far beyond the terms on the face of the rule, to state that **the Rule does not prevent the Supreme Court of Ohio from applying an unconstitutional rule on its face, in a constitutional manner,** thus, in essence, somehow curing the constitutional deficiencies readily apparent on its face by subsequent unrequired corrective action. With the District Court's misapplication of the *Salerno* test, you **never** can have a successful constitutional facial challenge because there is always the hope or possibility that someone would ignore the express unconstitutional terms on the face of the law or rule and still somehow apply it a constitutional manner. The District Court's erroneous application of an "as applied" test to a facial constitutional challenge eliminates facial challenges of the constitutionality of laws and rules, forcing all individuals to test their constitutionality by being actually exposed to the threat of sanctions. The test set forth in *Salerno*, to apply to "valid facial rule challenges" has all but been overruled. *City of Chicago v. Morales* 527 U.S. 41, 119 S. Ct. 1849, 144 L.Ed. 2d 67 (1999) Fn 22 ("To the extent we have consistently articulated a clear standard for facial challenges, it is **not** the *Salerno* formulation, which has never been the decisive factor in **any** decision of this Court, including *Salerno* itself.")

ARGUMENT 3

Attorneys, who regularly and presently appear before the highest court in a state because of a loophole in the law created by the *Rooker-Feldman* doctrine and 28 U.S.C. Section 1257, will be precluded from obtaining any facial review of the constitutionality of Supreme Court Rule XIV (5).

Should a state supreme court have the unfettered power to sanction attorneys *sua sponte,* without any notice or a reasonable opportunity to respond, under a practice rule that severely limits or entirely precludes constitutional review of that sanction decision by any other court? This case provides this Court the unique opportunity to establish the priority between the plenary power of courts to control the conduct of attorneys appearing before it and the vital constitutional due process requirements of notice and hearing.

Federal review of sanctions imposed pursuant to Ohio Supreme Court Practice Rule XIV, § *5* has been rendered unlikely, if not impossible, by two factors. First, the 1988 change in 28 U.S.C. § 1257, supplanting direct appeals from state supreme courts to this Court as a matter of right with appeals solely by certiorari, makes it highly unlikely or impossible that this Court will ever review a state court sanction ruling or a court rule such as Rule XIV, §5. Second, the *Rooker-Feldman* doctrine **prevents** unsuccessful state court litigants from bringing a *defacto* appeal of a state court decision in federal court. See, *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 476 (1983). *Rooker-Feldman* requires such litigants to pursue their appeal through the state court system, and theoretically only, if certiorari can be obtained, to this Court.

In short, the *Rooker-Feldman* doctrine and the 1988 change to 28 U.S.C. § *1257* have created a loophole in the law whereby a state supreme court can sanction an attorney under a practice rule that denies him or her not only the traditional due process safeguards of notice and hearing, but also the opportunity to appeal that due process deprivation to any other court. Thus, in these cases the state supreme court is the sole arbiter of the constitutionality of a rule that it alone has promulgated and that it alone enforces, without notice, hearing or appeal.

Because of these unique circumstances, the Ohio Supreme Court, and every other state supreme court in the nation, will have a green light to promulgate rules that give them unbridled discretion in sanctioning attorneys, unless this Court grants certiorari in every case where such sanctions are imposed. This Court has already recognized that such unbridled discretion is **not** consistent with the demands of the due process clause. See, e.g., *City of Chicago v. Morales,* 427 U.S. 41(1999). Such unbridled discretion is particularly pernicious in this instance since it creates a serious chilling effect for the attorneys who appear before courts that promulgate such rules. The "chilling effect" of sanctions on an attorney's zealous representation of clients will be great, and the possibility of any review is almost entirety precluded by the *Rooker-Feldman* doctrine and 28 U.S.C. § *1257.*

Does a state supreme court, in preventing any other court from reviewing the constitutionality of a rule which it promulgated and which it enforces, violate long cherished principles of federalism? Concerns for federalism were at the heart of the enactment of the Fourteenth Amendment to the United States Constitution, to assure the citizens of this country the protection of their federal constitutional rights by the states. Contrasting this Court's predilection for

maintaining comity between state and federal courts (i.e. *Rooker-Feldman)* with the potential for abuse — and accompanying chilling effect —inherent in Ohio Supreme Court Practice Rule XIV, § *5,* this Court should **not** ignore the long cherished principles of federalism and its duty under the 14th Amendment of the United States Constitution that is threatened by Rule XIV (5). Thus, certiorari should be granted, in this case.

CONCLUSION

This Court should grant the Petitioners their Writ of Certiorari to obtain review of a state's highest court rule which unconstitutionally deprives attorneys practicing before that court from receiving the constitutionally mandated fundamental due process requirements of notice and an opportunity to be heard or an opportunity at least to respond before that court *sua sponte* sanctions them. Absent this Court's granting certiorari, such sanctioned attorneys will have no effective means of redress and court's imposing such unconstitutional sanctions will otherwise escape any review or appeal of that initial decision because of the *Rooker-Feldman* doctrine and 28 U.S.C §1257. For these reasons attorneys regularly practicing before that court and presently appearing before that court, such as Petitioners, have the right to facially challenge such a blatantly unconstitutional rule. The failure to grant the Writ of Certiorari will result in convicted murderers in the State of Ohio enjoying a quantum of more due process protection than attorneys practicing before the Ohio Supreme Court. Under Ohio Supreme Court Rule XIV (5) attorneys practicing before the Ohio Supreme Court can be **sua sponte** punished by the Ohio Supreme Court **without notice and without a hearing or even the right to respond**. Murderers can at least seek federal court intervention by habeas corpus. The *Rooker-Feldman* doctrine and 28 U.S.C.

§1257 essentially **precludes** federal relief to Ohio attorneys who have been ambushed by the Ohio Supreme Court absent this Court's intervention. For these reasons, this Court should grant certiorari and accept this case so that this Court can address these **novel** federal constitutional issues of **first impression** and the conflicts between jurisdiction as to particularized notice in attorney sanction cases. This Court often grants convicted murderers multiple opportunities for review. Attorneys, such as Petitioners, should at least be afforded one opportunity to appear before this Court to address the unconstitutional professional death sentence awaiting them under Ohio Supreme Court Rule XIV, §5.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed June 5, 2001]

No. 99-4513; 00-3022

Timothy J. Grendell; Gerald W. Phillips, *Plaintiffs-Appellants/ Cross-Appellees*,	)
v.	)
The Ohio Supreme Court, et al., *Defendants-Appellees/ Cross-Appellants*.	)

Appeal from the United States District Court
for the Southern District of Ohio at Columbus
No. 99-01063
Edmund A. Sargus, Jr., District Judge

COLE and GILMAN, Circuit Judges;
ALDRICH, District Judge.*

*The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

ALDRICH, District Judge.

The plaintiff-appellants and cross-appellees, Timothy Grendell and Gerald Phillips ("Grendell"), bring this case against the defendant-appellees and cross-appellants, the Ohio Supreme Court and four of the justices serving on that Court ("the Ohio Supreme Court"), seeking declaratory and injunctive relief. Grendell argues that Ohio Supreme Court Practice Rule XIV, §§ 5 ("Rule XIV, §§ 5" or "the Rule") is unconstitutional on its face, violating the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution, since it does not afford notice and the opportunity to be heard. Ruling on the Ohio Supreme Court's motion to dismiss under Fed. R. Civ. P. 12(b)(6), Judge Edmund Sargus (S.D. Ohio) held that: (1) Grendell had standing to bring the claim; and (2) the Rule was not unconstitutional on its face. The case was dismissed and Grendell appeals to this Court. The Ohio Supreme Court cross-appeals on the issue of standing. For the following reasons, this Court **REVERSES** the district court on the issue of standing, and **AFFIRMS** the dismissal of Grendell's claim.

I. Background

This case involves sanctions imposed by the Ohio Supreme Court against the plaintiff-appellants in a different, though related case, *State of Ohio ex rel. Grendell v. Davidson*, 86 Ohio St. 3d 629, 716 N.E.2d 704 (Ohio 1999). In that case, Diane Grendell, a member of the Ohio House of Representatives ("Ohio House") and the wife of the plaintiff-appellant, sought the addition of a provision to an

appropriations bill in the Ohio General Assembly that would have resulted in funding for the Geauga County Airport Authority ("airport"). Though initially agreed upon by both the Ohio House and the Ohio Senate, the airport provision was eventually dropped from the appropriations bill by the conference committee. Grendell and his wife then brought suit against various members of the Ohio General Assembly, arguing that those members had violated internal legislative rules in dropping the airport provision. Grendell sought a writ of mandamus seeking, among other things, to compel the chairman of the Assembly conference committee to include the airport provision in a new committee report; to direct the Ohio House and Senate to vote on the report; and to order the Speaker of the Ohio House and the President of the Ohio Senate to present the bill to the governor. *See id.* at 630.

Not surprisingly, the Ohio Supreme Court dismissed the case. Citing a plethora of legal authority, that Court noted:

> [I]t is well settled that, in considering the validity of a statute, courts will not inquire into whether the legislature complied with its own rules in enacting the statute, so long as no constitutional provision is violated.

Id. at 633. Since the exclusion of the airport provision impugned no constitutional interests and dealt solely with observation of internal legislative procedures, the case was dismissed.

Before the issuance of the Ohio Supreme Court's opinion in State of Ohio ex rel. Grendell, the respondents in that case moved for sanctions pursuant to Ohio Rule of Civil

Procedure 11 and Ohio Revised Code §§ 2323.51. Grendell did not respond to that motion. In its decision, the Ohio Supreme Court addressed the Speaker's motion for sanctions, holding:

> Sanctions are warranted here. For the reasons previously discussed, this action is frivolous insofar as relators' counsel relied on the General Assembly's joint rules because the action is not reasonably well grounded in fact or warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. S.Ct.Prac.R. XIV(5). Further, as respondents contend, harassment is the only apparent rationale for relators' attorneys to erroneously allege that Thomas's actions constitute the criminal offenses of retaliation, intimidation, and coercion. Finally, these same attorneys recently filed a meritless extraordinary writ case in which we emphasized their "unjustified delaying tactics" and "acts of gamesmanship." *State ex rel. The Ryant Commt. v. Lorain Cty. Bd. of Elections* (1999), 86 Ohio St.3d 107, 113, 712 N.E.2d 696, 701.

State of Ohio ex rel. Grendell, 86 Ohio St. 3d at 636.

Grendell then brought the instant action in federal district court, seeking a temporary restraining order ("TRO") against the Ohio Supreme Court to prevent the enforcement of sanctions pursuant to Rule XIV, §§ 5. Grendell alleged that the Ohio Supreme Court violated due process when it imposed

sanctions pursuant to the Rule without notice and an opportunity to be heard. In recognition of the Rooker-Feldman doctrine of federal court jurisdiction, Grendell then amended his TRO to a general constitutional challenge seeking declaratory and injunctive relief. Grendell asserts that the Rule, on its face, violates the Due Process Clause as found in the Fifth and Fourteenth Amendments to the Constitution, since it fails to require notice and the opportunity to be heard before the imposition of sanctions. Grendell further claims that the Ohio Supreme Court's prior imposition of sanctions pursuant to the Rule led him to withdraw from two cases before that Court, for fear of exposing himself to unconstitutionally imposed sanctions. The district court dismissed the action, holding, among other things, that Grendell had standing to sue, but that his due process claim was not meritorious. Grendell timely appeals, arguing that Rule XIV, §§ 5 is unconstitutional on its face. The Ohio Supreme Court opposes and cross-appeals, arguing that Grendell has no standing to bring the claim. Grendell opposes the cross-appeal.

II. Standard of Review

This Court reviews a district court's legal determination of standing de novo. See *Johnson v. Econ. Dev. Corp. of the County of Oakland*, 241 F.3d 501, 507 (6th Cir. 2001). Since the district court dismissed this case pursuant to Fed. R. Civ. P. 12(b)(6), we accept all of Grendell's factual allegations as true. See Jackson v. City of Columbus, 194 F.3d 737, 746-47 (6th Cir. 1999).

III. Analysis

Standing is the "threshold question in every federal case." *Coyne v. American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999). In order to satisfy Article III's standing requirement, Grendell: (1) must have suffered some actual or threatened injury due the to alleged illegal conduct (the "injury in fact element"); (2) the injury must be fairly traceable to the challenged action (the "causation element"); and (3) there must be a substantial likelihood that the relief requested will redress or prevent Grendell's injury (the "redressability element"). See id. Since this case deals with declaratory and injunctive relief, a pre-enforcement challenge may be made before the actual completion of an injury in fact. See *Nat'l Rifle Assoc. of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997). However, "when seeking declaratory and injunctive relief, a plaintiff must show actual present harm or a significant possibility of future harm in order to demonstrate the need for pre-enforcement review." *Id.*

Grendell presents three arguments to support the claim that he has standing to make a facial constitutional challenge to Rule XIV, §§ 5. First, Grendell notes that he was previously sanctioned, allegedly without due process protections, in State of Ohio ex rel. Grendell. Second, Grendell claims that he is subject to the "continuing (sic) present adverse effects of the unconstitutionality of . . . Rule XIV(5)" that "chills" the exercise of protected conduct. Grendell's 3d Br. at 28. Third, Grendell argues that since his claim arises under the Rooker-Feldman doctrine of jurisdiction, he has standing to bring his facial challenge to the constitutionality of Rule XIV, §§ 5. None of these

justifications, however, are sufficient to confer standing in this case.

A. Past Exposure to Sanctions

As an initial matter, the mere fact that Grendell was previously sanctioned by the Ohio Supreme Court in State of Ohio ex rel. Grendell is not an adequate injury in fact to confer standing for declaratory and injunctive relief. As the Supreme Court has noted, "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). Indeed, prior precedent establishes that where a state court has issued sanctions pursuant to a civil contempt proceeding, only those litigants still under the influence of those penalties have standing. See Judice v. Vail, 430 U.S. 327, 332-33 (1977) ("once the period of incarceration is served or the fine paid, the effect of the orders imposing a fine or commitment has expended itself," and the party lacks standing to seek injunctive relief). As the sanctions imposed by the Ohio Supreme Court have already been perfected by State of Ohio ex rel. Grendell, this past injury has no continuing, present adverse effects and cannot establish standing for declaratory and injunctive relief.

Previous sanctions might be "evidence bearing on whether there is a real and immediate threat of repeated injury." Lyons, 461 U.S. at 102. However, where the threat of repeated injury is speculative or tenuous, there is no standing to seek injunctive relief. See id. at 109. For example, in Lyons, the plaintiff brought an action seeking to enjoin the Los Angeles Police Department ("L.A.P.D.") from using a

choke-hold during arrests that had caused several deaths. See id. at 97-98, 100. Though the L.A.P.D. had previously used the choke-hold against the plaintiff in that case, the Supreme Court held that the future threat of injury was still too speculative to confer standing for injunctive relief. The Supreme Court reasoned:

> That Lyons may have been illegally choked by the police . . . while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation . . . .

Id. at 105.

Similarly, in *Ashcroft v. Mattis*, 431 U.S. 171 (1977), the father of a boy who was killed while fleeing the police sought a declaration that a state statute which authorized police to use deadly force in apprehending a person who committed a felony was unconstitutional. *See id.* at 171 n. 1. In arguing that he had standing, the father alleged that he had another son who

> *if* ever arrested or brought under an attempt to arrest on suspicion of a felony, *might* flee or give the appearance of fleeing, and would therefore be *in danger* of being killed by these defendants or other police officers . . . .

Id. at 172 n. 2. Accordingly, the Supreme Court found the threat of future injury too speculative to confer standing. *See id.* at 173 n. 2.

Given this precedent, Grendell has not established sufficient injury in fact to seek declaratory and injunctive relief to enjoin the alleged illegal application of Rule XIV, §§ 5. In other words, Grendell has failed to show that he is subject to "actual present harm or a significant possibility of future harm" in order to seek the requested declaratory and injunctive relief. *Nat'l Rifle Assoc. of Am.*, 132 F.3d at 279. As with the plaintiffs in Lyons and Ashcroft, the threat of Grendell's future injury is highly conjectural, resting on a string of actions the occurrence of which is merely speculative. In short, to show a palpable threat of future injury necessary to achieve standing for declaratory and injunctive relief, Grendell must present evidence establishing: (1) that he is bringing or highly likely to bring a lawsuit before the Ohio Supreme Court; (2) that such lawsuit is allegedly frivolous, exposing him to sanctions under Rule XIV, §§ 5; (3) that the Ohio Supreme Court would, in its discretion, impose such sanctions; and (4) that the imposition of those sanctions would violate due process. Such a chain of events is simply too attenuated to establish injury in fact, and to confer the required standing in this case.

B. "Chilling Effect"

Grendell also argues that the Ohio Supreme Court's power to sanction attorneys pursuant to Rule XIV, §§ 5, "continuously expose[s the plaintiff-appellants] . . . to the 'chilling effect' of the hanging of the 'Sword of Damocles' over them." Grendell's 3d Br. at 27-28. As evidence of this

chilling effect, Grendell avers that fear of unconstitutionally imposed sanctions forced him to withdraw from two recent cases before the Ohio Supreme Court.

Grendell cannot argue, however, that a chilling effect due to the possibility of attorney sanctions in this case is an injury sufficient to confer standing. It is well-settled that facial constitutional challenges relying on the overbreadth doctrine, and the resultant chilling effect such overbreadth has on speech, are limited to the First Amendment sphere. See *City of Chicago v. Morales*, 527 U.S. 41, 52-53 (1999); *United States v. Salerno*, 481 U.S. 739, 745 (1987); see also *Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993) (noting that chilling effect and overbreadth are linked concepts). While the Supreme Court has previously stated that "some lawyering activity is undoubtedly protected by the First Amendment," that activity has dealt with "meaningful access to the courts." *See Roberts v. United States Jaycees*, 468 U.S. 609, 637 (1984) (O'Connor, J., concurring in part and concurring in judgment). Such activity has generally been confined to interference with an attorney's right to solicit or organize clients, especially for political or social purposes, *see e.g. In re Primus*, 436 U.S. 412, 431-32 (1978); or interference with a prisoner's right of access to legal materials or legal assistance in order to petition the government for a redress of grievances. *See e.g. Lewis v. Casey*, 518 U.S. 343, 350-51 (1996). As Rule XIV, §§ 5 deals with sanctions imposed against attorneys for frivolous or harassing lawsuits, *see State of Ohio ex rel. Grendell*, 86 Ohio St. 3d at 636, no First Amendment activity is impugned in this case.

Even assuming *arguendo* that attorney sanctions for frivolous or harassing lawsuits implicate First Amendment

concerns, Grendell cannot establish that his fear of unconstitutionally imposed sanctions is a chilling effect sufficient to confer standing. In dealing with the chilling effect criminal statutes have on First Amendment expression, the Supreme Court has previously noted that "it is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thomspson*, 415 U.S. 452, 459 (1973). However, those fears of prosecution cannot be merely "imaginary or speculative." *Younger v. Harris*, 401 U.S. 37, 42 (1971).

For example, in *Steffel*, a Vietnam War protestor made a pre-enforcement challenge against an anti-handbilling statute. *See Steffel*, 415 U.S. at 455. The plaintiff established that he was twice warned to stop handbilling; informed that he would likely be prosecuted if he again handbilled and disobeyed a warning to stop; and his handbilling companion was prosecuted. *See id.* at 459. Accordingly, the Supreme Court determined that the plaintiff had made "ample demonstration that [his] concern with arrest [was not] chimerical." *Id.* By contrast, in Younger, two members of the Progressive Labor Party and a history professor made a pre-enforcement challenge against a state law that would allegedly have prevented the plaintiffs from advocating or teaching socialist or communist doctrine. *See Younger*, 401 U.S. at 39-40. In holding that the three plaintiffs had failed to allege an actual case or controversy, the Supreme Court explained:

> If these three had alleged that they would be prosecuted for the conduct they planned to engage in, and if the District Court had found this allegation to be true--either on the

> admission of the State's district attorney or on any other evidence--then a genuine controversy might be said to exist. But here appellees . . . do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible. They claim the right to bring this suit solely because, in the language of their complaint, they "feel inhibited."

Younger, 401 U.S. at 42.

In this case, Grendell's fear of unconstitutionally imposed sanctions are similar to the fears of the plaintiffs in Younger. Of course, this Court assumes for the purposes of a motion to dismiss, that Grendell withdrew from cases before the Ohio Supreme Court for fear of unconstitutionally imposed sanctions pursuant to Rule XIV, §§ 5. However, the mere fact that Grendell subjectively fears such sanctions, or "feels inhibited" by the Ohio Supreme Court's sanctioning power, does not objectively establish an imminent threat that chills protected activity. *See Steffel*, 415 U.S. at 476 (Stewart J. concurring). While the previous imposition of sanctions is a factor this Court can consider in its standing determination, *see LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000), Grendell presents no evidence that the Ohio Supreme Court threatened to sanction him in the cases from which he voluntarily withdrew, nor does he present evidence that the Ohio Supreme Court currently threatens him with sanctions in any other case. Accordingly, any alleged chilling effect that Rule XIV, §§ 5 has on protected activity is an insufficient injury to support standing.

C. The *Rooker-Feldman* Doctrine and Standing

Grendell also claims that an application of the Rooker-Feldman doctrine[1] ensures his standing in this case. In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)[2], Feldman challenged in "state" court[3] a District of Columbia bar admission rule which required bar applicants to submit proof of graduation from an American Bar Association accredited law school. Feldman, a bar certified lawyer in both Virginia and Maryland, received his legal education through a program of structured apprenticeship endorsed by the state of Virginia. *See id.* at 465. Given his "unusually high qualifications," Feldman sought immediate admission to the District of Columbia bar, or in the alternative, a waiver of the bar admission rule and an opportunity to sit for the bar examination. *Id.* at 467, 468-69. The District of Columbia Court of Appeals eventually upheld the bar admission regulation and dismissed the case. Feldman then brought suit in federal court, arguing that the District of Columbia Court of Appeals had acted unconstitutionally. The federal district court dismissed the action for lack of subject matter jurisdiction. *See id.* at 470.

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[1] The *Rooker-Feldman* doctrine derives its name from two cases - *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), which revived a doctrine of federal court jurisdiction established by *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

[2] *Feldman* actually addresses two companion cases, but only Feldman's need be described here.

[3] The District of Columbia Court of Appeals is the equivalent of a state supreme court.

The Supreme Court agreed, noting that a federal district court has no subject matter jurisdiction over state supreme court proceedings that are "judicial" in nature, and that review of such proceedings is available only in the United States Supreme Court. *See id.* at 476 (citing 28 U.S.C. §§ 1257). The Supreme Court then stated that a "judicial inquiry" is when "the court was called upon to investigate, declare, and enforce liabilities as they [stood] on present or past facts and under laws supposed already to exist." *Id.* at 479 (internal quotes and citation omitted). Consequently, Feldman could not make a collateral attack in federal district court on the District of Columbia Court of Appeals decision to dismiss the bar application, since that decision involved whether Feldman would be qualified for an exception to the bar application rule under those specific facts. *See id.* at 480-81.

However, the Supreme Court then drew a distinction between state court determinations that were "judicial" in nature, and those that were "legislative, ministerial or administrative." *Id.* at 479. Under such a distinction, a review of the state court decision denying the particular bar application might run afoul of federalism, but a "general challenge to the constitutionality" of the bar admission rule would not. *Id.* at 482-83. This is because a general constitutional challenge would not require a district court "to review a final state-court judgment in a judicial proceeding"; rather, the "district court may simply be asked to assess the validity of a rule promulgated in a nonjudicial proceeding." *Id.* at 486. Consequently, a district court would have subject matter jurisdiction to assess a general constitutional challenge to a state court rule. *See id.* at 487.

As noted earlier, Grendell's initial complaint sought a TRO to prevent the enforcement of sanctions imposed by the Ohio Supreme Court in *State of Ohio ex rel.* Grendell. Recognizing that the *Rooker-Feldman* doctrine likely barred federal district court review of the imposition of sanctions -- as that would involve lower federal court review of the Ohio Supreme Court's judgment in *State of Ohio ex rel.* Grendell -- Grendell voluntarily amended this initial complaint to a general constitutional challenge to Rule XIV, §§ 5. Given this conformity with the strictures of the *Rooker-Feldman* doctrine, the district court reasoned that if the "Supreme Court expressly stated that applicants for admission to the bar have standing" to bring a general constitutional challenge to the bar admission rule in *Feldman*, then Grendell must have standing to bring a general constitutional challenge to Rule XIV, §§ 5 in this case. Sargus Opinion and Order of 11/5/99, J.A. at 45.

We disagree. As an initial matter, the district court's assertion that, in *Feldman*, the Supreme Court found that the litigants had standing, is imprecise. This Court recognizes that *Feldman* expressly found that the district court in that case "has subject matter jurisdiction over [the general constitutional challenge] of [Feldman's] complaint[]." *Feldman*, 420 U.S. at 487. Given that standing is an essential component of jurisdiction in the federal courts, *see e.g. Allen v. Wright*, 468 U.S. 737, 750-51 (1984), it is understandable that the district court in this case would conflate such language with an explicit finding of standing. However, the central holding of *Feldman* is that jurisdictional statutes, such as 28 U.S.C. §§ 1257, prohibit federal district court review of a state supreme court judgment, but do not limit the jurisdiction of the federal district court as it relates to general

constitutional challenges of state court rules. In this context, then, the Supreme Court's statement concerning subject matter jurisdiction in *Feldman* is most naturally read as a conclusion concerning the proper jurisdictional scope of constitutional challenges to state court rules, and should not be read as implicating the standing of a litigant seeking declaratory and injunctive relief.

Such a construal of the holding in *Feldman* is also consistent with prior precedent. As the Supreme Court has previously noted, "when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans v. Lavine*, 415 U.S. 528, 535 n. 5 (1974). This is especially true as it relates to the issue of standing, "perhaps the most important of [the jurisdictional] doctrines." *FW/PBS v. City of Dallas*, 493 U.S. 215, 231 (1990). Accordingly, the Supreme Court's determination in Feldman concerning a federal district court's subject matter jurisdiction over a general constitutional challenge, made without comment as to the standing of the litigants, cannot be construed as implying that all general constitutional challenges made in recognition of the *Rooker-Feldman* doctrine confer standing on those litigants. Indeed, other circuit courts have refused to endorse the notion that a claim's conformity with the strictures of the *Rooker-Feldman* doctrine absolves a litigant from establishing proper standing. *See Landers Seed Co., Inc. v. Champaign Nat'l Bank*, 15 F.3d 729, 732 (7th Cir. 1994) (noting that if the plaintiff sought review of a state court verdict in lower federal court, the *Rooker-Feldman* doctrine barred jurisdiction; and if the plaintiff sought only declaratory and injunctive relief in recognition of the *Rooker-Feldman* limitation, "it would not

have standing to sue"); *Facio v. Jones*, 929 F.2d 541, 544-45 (10th Cir. 1991) (holding that a plaintiff did not have standing to seek declaratory relief, since under the *Rooker-Feldman* doctrine he was "[u]nable to attack the final [state court] default judgment rendered against him," and he could not show "that he will again be subject to the [state court] default provisions" which would give rise to an actual controversy).

Even if this Court were to construe the Supreme Court's language in *Feldman* as an implication that the litigants had achieved standing, the facts of that case are clearly distinguishable from the present case. In *Feldman*, the plaintiff made a general constitutional challenge to the District of Columbia bar application rule. *See Feldman*, 460 U.S. at 487 n. 18. While not permitted to challenge the District of Columbia Court of Appeals decision to deny his application, *Feldman* could nevertheless reapply to sit for the District of Columbia bar examination. As the Tenth Circuit notes, Feldman "still had an interest in practicing law in the state or district involved and therefore had standing to assert that the restrictive bar admission rules should be declared unconstitutional." *Facio*, 929 F.2d at 545. Said differently, because Feldman was prohibited from admission to the bar, he was subject to the "continuing, present adverse effects" necessary to establish standing for declaratory and injunctive relief. *Lyons*, 461 U.S. 95, 102 (1983).

In this case, however, Grendell cannot establish such continuing, present adverse effects. The *Rooker-Feldman* doctrine and 28 U.S.C. §§ 1257 effectively foreclose review of the Ohio Supreme Court's decision to impose sanctions in *State of Ohio ex rel. Grendell* in the lower federal courts. Accordingly, such sanctions are final, and cannot be

overturned even if Rule XIV, §§ 5 is later held facially unconstitutional. *See Blue Diamond Coal Co. v. Trs. of the UMWA Combined Benefit Fund*, -- F.3d --, 2001 WL 459913, at *3 (6th Cir. 2001) (noting that a change in decisional law on constitutional grounds is rarely an extraordinary circumstance meriting relief from final judgment). As noted earlier, Grendell also has not established that the Ohio Supreme Court has threatened sanctions against him in the cases from which he voluntarily withdrew or any other case currently before that Court. Accordingly, he is not subject to the continuing harm of Rule XIV, §§ 5, and therefore lacks standing to seek declaratory and injunctive relief.

As a final note, although we take a dim view of Grendell's claim that Rule XIV, §§ 5, on its face, violates the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution, we reach our conclusion in this case solely on the issue of standing. As this Court will not issue advisory opinions, we decline to comment on the merits of Grendell's constitutional claim. *See Johnson v. Turner*, 125 F.3d 324, 336-37 (6th Cir. 1997) (noting that the standing requirement has been construed to prohibit advisory opinions).

IV. Conclusion

For these reasons, this Court concludes that the plaintiff-appellants and cross-appellees have no standing, and we **REVERSE** the district court on that claim. As the district court lacks jurisdiction due to lack of standing, we also **AFFIRM** the district court's dismissal of this action.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed November 5, 1999]

No. C2-99-1063

Timothy J. Grendell, et al.,
Plaintiffs

v.

The Ohio Supreme Court,
Defendant.

Judge: Edmund A. Sargus, Jr.
Magistrate Judge: Mark R. Abel

OPINION AND ORDER

On October 14, 1999, plaintiffs initiated this action by filing a five-count Complaint against the Ohio Supreme Court and four justices serving thereon. In essence, the plaintiffs alleged that they were subjected to sanctions under Ohio Supreme Court Practice Rule XIV, Section 5 without a hearing. In their original Complaint, the plaintiffs asserted

that the Rule is constitutionally inform by failing to require a hearing before the impositions of sanctions and, further, that such Rule was unconstitutionally applied to them in an Order issued by the Ohio Supreme Court on September 28, 1999 granting a motion for sanctions against both plaintiffs.

Plaintiffs also moved this Court to issue a temporary restraining order and preliminary injunction. This Court scheduled an informal conference pursuant to Southern District of Ohio Civil Rule 65.1 which was held on October 18, 1999. At the informal conference, all parties, through counsel, agreed that the facts in this matter were not in dispute and that issues presented were questions of law.[1]

On October 22, 1999, the plaintiffs filed an Amended Verified Complaint, seeking declaratory judgment and injunctive relief. In light of this, plaintiffs also withdrew their application for a temporary restraining order. In the

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[1] At the informal conference held on October 18, 1999, the parties, through counsel, stipulated on the record that no facts were in dispute. On November 4, 1999, plaintiffs noticed the Court that they did not agree to any stipulation as to facts set forth in the defendants' filings in this case. The Court has set fourth only facts averred to by the plaintiffs in verified pleading submitted in this case. The Court also notes its extreme displeasure that on November 4, 1999, plaintiffs, intent on getting the last work, filed an affidavit of Gerald Phillips. The affidavit was filed one day before the date this Court told counsel that a decision would issue. Plaintiffs also filed on November 4, 1999, a fifteen page brief for which no leave was sought, which was submitted after conclusion of the briefing schedule, and was filed four days after oral argument.

Amended Complaint, plaintiffs name a single defendant, that being the Supreme Court of Ohio. Filed contemporaneously with the Amended Complaint was a Notice of Voluntary Dismissal of three counts in the initial Complaint. Plaintiffs represented in the notice that they intended to file for a Writ of Certiorari with the United States Supreme Court seeking review of the order issued by the Ohio Supreme Court imposing sanctions against both plaintiffs.

The Amended Complaint seeks a declaratory judgment determining that Ohio Supreme Court Practice Rule XIV, Section 5 is facially unconstitutional under the Fifth and Fourteenth Amendments of the United States Constitution. Count II of the Amended Complaint seeks a preliminary and permanent injunction enjoining the Ohio Supreme Court from enforcing and applying Ohio Supreme Court Practice Rule XIV, Section 5.

The Ohio Supreme Court has filed a Motion to Dismiss. The plaintiffs originally filed their Memorandum in Opposition on October 18, 1999. The Court permitted the plaintiffs to supplement their Memorandum in Opposition. Plaintiffs second brief in opposition was field on October 22, 1999. The defendants have replied to the plaintiffs' Memorandum in Opposition and the matter is now before the Court for decision.

I.

The plaintiffs' initial Complaint challenged the imposition of sanctions issued against them by the Ohio Supreme Court in case of *State of Ohio ex rel. Grendell v. Davidson*, 86 Ohio St. 3d 629 (1999). Both plaintiffs in this

action were counsel of record in the proceedings before the Ohio Supreme Court, while Plaintiff Timothy J. Grendall was also a relator.

The following matters are set forth in the decision of the Ohio Supreme Court, which is annexed to plaintiffs' Verified Complaint. In the proceeding before the Ohio Supreme Court, Plaintiff Timothy J. Grendell and Diane V. Grendell, a member of the Ohio House of Representatives, and a nonprofit taxpayer corporation, filed an action seeking a Writ of Mandamus to compel the inclusion of airport funds in an appropriations bill passed by the Ohio Legislature. Representative Diane V. Grendell, who is not a party in this case, initially proposed that a sum of money be included in an appropriations bill to fund the Geauga County Airport Authority. The bill, which included funding for the airport, passed both the Ohio House of Representatives and the State Senate. The versions passed by each House, however, were not identical and were submitted to a conference committee consisting of elected representatives form the House and the Senate. Thereafter, the conference committee deleted the funds otherwise appropriated to the Geauga County Airport Authority.

The relators alleged in their action that Joint Rule 19 of the Ohio General Assembly permitted a conference committee to consider only :matters of difference between the two Houses." According to the relators, since both Houses had passed the funds for the airport, the matter should not have been considered by the conference committee.

The Ohio Supreme Court concluded that it had not authority to consider whether the legislature complied with its

own rules, so long as no constitutional provision was involved. The court cited a plethora of legal authority to the effect that the controversy was nonjusticiable in that Section 7, Article II of the Ohio Constitution provides that "each House shall determine its own rules of proceeding." According to the Ohio Supreme Court, the issuance and observance of such procedural rules is a matter committed exclusively to the General Assembly of Ohio.

On July 1, 1999, several months prior to the final decision of the Ohio Supreme Court, the respondents filed a motion for sanctions which is al annexed to plaintiffs' Complaint. The motion was filed pursuant to Ohio Rule of Civil Procedure 11[2] and Ohio Revised Code § 2323.51. The motion asserted that the underlying complaint for mandamus was "frivolous and groundless" and contained "scandalous material." Specifically, the motion stated:

> There exists no constitutional, statutory, or common law grounds that support a House representative bringing an action against the Speaker of the House, President of the Senate, Conference Committee Chair in both the House of Representatives and the Senate because she was unable to secure an earmark that she lobbied for in the budget ball. Without such precedent. no reasonable attorney could believe could believe that good

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[2] Because an action is subject to the original jurisdiction of the Ohio Supreme Court, Ohio Rule of Civil Procedure 11 was applicable to the proceeding.

> grounds exist to file a complaint and mandamus requesting the Ohio Supreme Court intervene in the legislative process and decide what earmarks shall become law.

The record before this Court does not reflect that plaintiffs responded to the motion for sanctions filed by the respondent in the action before the Ohio Supreme Court.[3] In its decision of September 28, 1999, the Ohio Supreme Court also addressed the respondent's motion for sanctions by holding:

> Sanctions are warranted here. For the reasons previously discussed, this action is frivolous insofar as relators' counsel relied on the General Assembly's joint rules because the action is not reasonably well grounded in fact or warranted by existing law or a good-faith argument for the extension, modifications, or reversal of existing law. S. Ct. Prac. R. XVI(5). Further, as respondents contend, harassment is the only apparent rationale for relators' attorneys to erroneously allege that Thomas's actions constitute the criminal offenses of retaliation, intimidation, and coercion. Finally, the same attorneys recently

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[3] Defendants represented at oral argument that the plaintiffs did not respond to the motion for sanctions. Plaintiffs did not challenge this assertion. Since plaintiffs have refused any stipulation other that tot heir own version of the facts, the Court will simply conclude that the plaintiffs have not averred that they were prevented from responding to the motion for sanctions.

> filed a meritless extraordinary writ case in which we emphasized their "unjustified delaying tactics" and "acts of gamemanship." *State ex rel. The Ryant Commt. v. Lorain Cty. Bd. of Elections*, 86 Ohio St. 3d 107, 113 (1999).[4]

State ex rel. Grendell, 86 Ohio St. 3d at 635.

II.

In its Motion to Dismiss, the defendants assert that this Court lacks subject matter jurisdiction as to the issues raised by the plaintiffs. The defendants contend that any claims asserted against the Ohio Supreme Court are barred by the Eleventh Amendment to the United States Constitution.[5] The

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[4] The amount of the sanctions in *State ex rel. Grendell* is yet to be determined. The respondents' have submitted an itemization of the attorneys fees incurred and the plaintiffs in this case have had an opportunity to reply.

[5] The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or Subjects of any Foreign State.

Defendants further assert that the plaintiffs may only recover prospective relief as to any claims asserted against individual members of the Supreme Court. Because of such limitation, the defendants allege that as a consequence, plaintiffs lack standing to bring this action. The Court wills separately address each of these three challenges to subject matter jurisdiction.

As an initial matter, it is beyond dispute that this Court may not review judgments of the various state courts. This doctrine was first expressed in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and more recently in the case of *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Under what is termed as the *Rooker-Feldman* doctrine, a district court lacks subject matter jurisdiction over a complaint which constitutes an appeal or collateral attack on a state court judgment.[6]

The absence of jurisdiction in the district court to review final decisions of the various state courts is due in part to principled of comity and federalism. In addition, under Article III of the United States Constitution, Congress is authorized to define the subject matter jurisdiction of the federal courts. Congress has conferred upon the United States Supreme Court the following jurisdiction:

U.S. CONST. amend XI.

[6] An exception to this rule is found in 28 U.S.C. § 2254 which permits a party imprisoned by a state court to seek habeas corpus relief in a federal district court. This exception is not germane to this action.

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant tot he Constitution , treaties, or laws of the United state, or where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. No such jurisdiction has been conferred upon the district courts.

28 U.S.C. § 1257(a).

It is therefore beyond dispute that this Court lacks the subject matter jurisdiction to review a final decision to the Ohio Supreme Court or to permit a collateral attack upon that court's final judgment. At the same time, the United States Supreme Court has distinguished between "judicial and administrative or ministerial proceedings of a state court." *Feldman*, 460 U.S. at 476. As concluded in *Feldman* "[t]o the extend that Hickey and Feldman mounted a general challenge to the constitutionality of Rule 46(I)(b)(3), however, the district court did have subject matter jurisdiction over their complaints." 460 U.S. at 483. Thus, while this Court has no subject matter jurisdiction to review a judicial decision of the Ohio Supreme Court, it does have the jurisdiction to

consider a challenge to the constitutionality of a rule promulgated by the state court.

In this context, this Court may only review the challenge raised by the plaintiffs to Supreme Court Practice Rule XIV, Section 5. This Court lacks subject matter jurisdiction to determine whether the Ohio Supreme Court wrongfully subjected plaintiffs to sanctions under the Rules, such issues representing an attempt at review or a collateral attack upon state court's judgment.

A. ELEVENTH AMENDMENT IMMUNITY

In the absence of its consent, the State or one of its agencies or departments may not be sued by a plaintiff, other than the United States of America, in federal court. As an independent branch of state government, the Ohio Supreme Court may not be sued in federal court by the very terms of the Eleventh Amendment to the Constitution.

It is therefore ordered that the Ohio Supreme Court is dismissed from this action.

B. RELIEF UNDER *EX PARTE YOUNG*

While the Eleventh Amendment provides the States with immunity from suit in federal court, in *Ex Parte Young*, 209 U.S. 123 (1908), the Supreme Court recognized that a state official acting to enforce a statute or rule in violation of the United States Constitution or federal statute could be enjoined, not withstanding the Eleventh Amendment. The relief available under *Ex Parte Young*, however, must be prospective in the form of injunctive relief. The Supreme

Court has held in *Edelman v. Jordan*, 415 U.S. 651 (1974), that remedies available under the *Ex Parte Young* doctrine may not include retroactive relief.

The Court notes that the original Complaint filed herein named four members of the Ohio Supreme court as individual defendants. The Amended Complaint names only the Ohio Supreme Court as the sole defendant. During oral argument, without opposition from defendants' counsel,[7] the plaintiffs were granted leave of court to add the four individual justices named in the original Complaint as defendants with respect to the Amended Complaint. The Amended Complaint on its face sets forth claims for relief against the individual justices under an *Ex Parte Young* theory. For the sake of judicial economy, the Court encouraged and granted the plaintiffs' oral motion. Fed. R. Civ. P. 15(a).

In light of the foregoing, the Court finds as an initial matter of jurisdiction, that the Amended Complaint, as orally amended, sets forth a valid theory under the *Ex Parte Young* doctrine. This conclusion is, of course, made before analysis of whether Supreme Court Rule of Practice XIV, Section 5 passes constitutional muster.

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[7] The same counsel currently representing the Ohio Supreme Court also represented the four individual justices with respect to the original Complaint.

C. STANDING

The defendants next argue that because the relief available is prospective in nature, plaintiffs lack standing to challenge Ohio Supreme Court Practice Rule XIV, Section 5. According to defendants, plaintiffs cannot demonstrate a personal stake in their lawsuit challenging the Rule. It is, of course, fundamental that a party invoking the jurisdiction of this Court must allege an actual "case or controversy" as required by Article III of the United States Constitution.

While the arguments advanced by the defendants are cogent, this Court is not convinced the plaintiffs, both practicing attorneys who have now been sanctioned under the challenged Rule of the Ohio Supreme Court, lack the requisite interest or standing to bring the claims asserted in the Amended Complaint. Further, in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. at 478-79, the Supreme Court expressly stated that applicants for admission to the bar have standing to challenge rules of admissions established by various state supreme courts even though the same parties may not directly contest in district courts individual decisions denying admission. While the analogy to plaintiff's position in this case is not precise, this Court is persuaded that plaintiffs have satisfied the requirement of standing.

III.

The Court next considers the substantive issue raised by the plaintiffs, that being whether Ohio Supreme Court Rule XIV, Section 5 is facially unconstitutional. The Rule states in its entirety:

> If the Supreme Court, on motion or on its own initiative, determines that an appeal or other action is frivolous or is prosecuted for a delay, harassment or any improper purpose, it may impose, on the person who signed the appeal or action, a represented party, or both, appropriate sanctions, including an award to the opposing party, or both, appropriate sanctions, including an award to the opposing party, of reasonable expenses, reasonable attorneys fees, costs or double costs, or any other sanction considered just. An appeal or other action shall be considered frivolous if it is not reasonable, well-grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

A party asserting a facial challenge to the constitutionality of a statute or rule faces a heavy burden. In *United States v. Salerno*, the Supreme Court noted:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists which under the Act would be valid. The fact that [a statute or court rule] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized

> an "overbreadth" doctrine outside the limited context of the First Amendment.[8]

481 U.S. 739, 745 (1987); *see also Reno v. Flores*, 507 U.S. 292, 301 (1993) (holding that a plaintiff mounting a facial challenge show "no set of circumstances" under which the statute would be valid).

The plaintiffs assert that on its face Ohio Supreme Court Practice Rule XIV, Section 5 is constitutionally infirm insofar as sanctions may be imposed without notice or opportunity to be heard. Plaintiffs cite this Court to *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), for the proposition that the Fifth and the Fourteenth Amendments to the Constitution require notice and hearing before the imposition of sanctions. In *Roadway Express*, the Supreme Court reviewed the authority of federal courts to impose sanctions in the form of attorney's fees under both 28 U.S.C. § 1927 and Federal Rule of Civil Procedure 37. Plaintiffs point this Court to the portion of *Roadway Express* decision which states, "Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity or a hearing on the record." *Id* at 767.

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[8] *Salerno* has not been applied in recent abortion decisions, according to *Women's Medical Professional Corp. v. Voinovich*, 130 F. 3d 187 (6th Cir. 1997). The Sixth Circuit has looked to whether a particular statue regulating abortion will "constitute an undue burden" on abortion, rather that the *Salerno* test that under no circumstances could the statute be valid. *Id.* at 195. As will be noted below, the challenged Rule herein meets either standard.

Plaintiffs fail to note, however, that the federal statute reviewed in *Roadway Express*, does not on its face require notice or right to respond before sanctions in the form of attorney's fees may be awarded. 28 U.S.C. § 1927 states as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the Court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.[9]

Further, the statute permits a Court to act on its own initiative, similar to the language of Ohio Supreme Court Practice Rule XIV, Section 5 which permits the Court to initiate sanctions. It is clear that under the Constitution, attorneys must be given notice and provided with an opportunity to respond before sanctions may issue. The Court does not agree, however, that a full evidentiary hearing is required in every case involving the imposition of potential

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[9] The last phrase of the current version of 28 U.S.C. § 1927 allowing recovery of "attorney's fees reasonably incurred because of such conduct" was added on September 12, 1980. The *Roadway Express* case was decided on June 23, 1980. The statute in effect on the date of the Supreme Court's decision did not permit attorney's fees but did allow imposition of costs against an attorney acting unreasonably or vexatiously. The fact that the statute has been subsequently amended is irrelevant to the issue before this Court.

sanctions. As recently noted by the court of appeals in *Cook v. American Steamship Co.*, "It is apparent in this circuit, as well as others, that when imposing sanctions, a full evidentiary hearing is not required...What is required, however, is that before the imposition of sanctions, the attorney must be given notice and an opportunity to be heard." 134 F. 3d 771, 774 (6th Cir. 1998) (citations omitted).

The precise issue before this Court is whether the absence of a provision requiring notice and an opportunity to be heard in Ohio Supreme Court Rule of Practice XIV, Section 5, before sanctions are issued renders the Rule unconstitutional. For several reasons, this Court concludes that the Rule is not facially unconstitutional. First, this Court must inquire as to whether there are "no set of circumstances...under which the [rule] would be valid." *United States v. Salerno*, 481 U.S. at 745. Under this analysis, the Court must determine if any provision of the challenged Rule prevents the Ohio Supreme Court from acting in a manner consistent with the United States Constitution. Nothing in the Rule prohibits the Supreme Court from providing notice or an opportunity to be heard to an attorney before sanctions may issue.[10] This Court concludes that the Rule therefore survives a facial challenge so long as the

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[10] Even applying the more liberal task in *Women's Medical Professional Corp., supra*, the Rule does not unduly burden attorney conduct and, as noted below, when interpreted in light of the constitutional requirement of notice and a right to respond, may be applied in a constitutional manner consistent with the Rule itself.

challenged Rule does not prevent the Supreme Court of Ohio from providing notice and an opportunity to be heard.

Second, this Court notes that the alleged constitutional deficiency in the challenged Ohio Supreme Court Rule is also absent in 28 U.S.C. § 1927, a statute which was extensively reviewed by the Supreme Court in *Roadway Express*. While the United States Supreme Court required notice and an opportunity to be heard. The absence of statutory requirements of the same did not cause the Supreme Court to declare the statute unconstitutional. Similar to 28 U.S.C. § 1927, Ohio Supreme Court Rule XIV, Section 5 provides for an imposition of sanctions without expressly providing for notice and an opportunity to be heard. Such requirement, however, may be imposed by the Ohio Supreme Court in its application of the Rule. In the absence of evidence to the contrary, this Court may certainly assume that the Ohio Supreme Court will act in accordance with the Constitution.

Third, although this matter has been narrowed to a facial challenge of the Rule, this Court may also consider the fact that the plaintiffs themselves were provided with ample notice and an opportunity to be heard before the Ohio Supreme Court acted pursuant to Rule of Practice XIV, Section 5. A motion for sanctions was filed against the plaintiffs. The plaintiffs were given ample opportunity to respond, although they apparently declined the opportunity. The very facts of this case indicate that the Ohio Supreme

Court is well aware that notice and an opportunity to be heard are required before the imposition of sanctions.[11]

Finally, this Court is mindful of the admonitions set forth in *Younger v. Harris*, 401 U.S. 37 (1971):

> Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts...This underlying reason...[is] a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate function in their separate ways...The

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[11] The motion for sanctions sought relief under Ohio Rule of Civil Procedure 11 and Ohio Revised Code § 2323.51 (A)(2)(a)(I). The motion did not specifically reference or seek releif under Ohio Supreme Court Rule of Practice XIV, Section 5. In this Court's view, the lack of reference to the Rule is of no consequence. The Rule allows for sanctions in the form of attorney's fees for frivolous conduct or prosecution of a case for delay, harassment or any other improper purpose. Rule 11 requires that a pleading be supported by "good grounds...and that it is not interposed for delay." Ohio Revised Code §2323.51 permits an award of attorney's fees as sanctions for frivoulous conduct. It is clear then that Rule 11 and Ohio Revised Code § 2323.51 prohibit the precise type of conduct as does Ohio Supreme Court Rule of Practice XIV, Section 5.

> concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 43, 44-45.

The Supreme Court of Ohio has a strong, legitimate interest in regulating the conduct of attorneys and parties appearing before it. The challenged Rule is an important component of such regulation. This Court cannot assume that the Ohio Supreme Court Rule will apply the Rule in derogation of the Constitution; the limited record before this Court demonstrates that the Rule has been interpreted in a manner wholly consistent with the Constitution.

IV.

Based upon the foregoing, this Court finds that the Ohio Supreme Court possesses immunity from suit in this case under the Eleventh Amendment. This Court further concludes that Ohio Supreme Court Practice Rule XIV, Section 5 is not facially unconstitutional. The plaintiffs are not entitled to injunctive relief or declaratory judgment

finding such Rule to be unconstitutional and enjoining enforcement of the same. It is therefore the decision of this Court that the defendants' Motion to Dismiss is well taken. For the foregoing reasons, the defendants' Motion to Dismiss is **GRANTED**. This case is **DISMISSED**.[12]

IT IS SO ORDERED

11/05/99
DATE

/s/
EDMUND A. SARGUS, JR.
UNITED STATES
DISTRICT JUDGE

[12] The Court reserves jurisdiction to decide the pending Motion for Sanctions.

APPENDIX C

SUPREME COURT OF OHIO

RULE XIV
SECTION 5

Frivolous Actions; Sanctions.

If the Supreme Court, on motion or on its own initiative, determines that an appeal or other action is frivolous or is prosecuted for delay, harassment, or any other improper purpose, it may impose, on the person who signed the appeal or action, a represented party, or both, appropriate sanctions, including an award to the opposing party of reasonable expenses, reasonable attorney fees, costs or double costs, or any other sanction considered just. An appeal or other action shall be considered frivolous if it is not reasonably well-grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

APPENDIX D

OHIO REVISED CODE

TITLE XXIII [23] COURTS -- COMMON PLEAS
CHAPTER 2323: JUDGMENT
[SECURITY FOR COSTS]

§ 2323.51 Frivolous conduct in civil actions.

-- Pre-HB 350 (Tort Reform Act) version of this section.

(A) As used in this section:

(1) "Conduct" means any of the following:

(a) The filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, or the taking of any other action in connection with a civil action;

(b) The filing by an inmate of a civil action or appeal against a government entity or employee, the assertion of a claim, defense or other position in connection with a civil action of that nature or the assertion of issues of law in an appeal of that nature, or the taking of any other action in connection with a civil action or appeal of that nature.

(2) "Frivolous conduct" means either of the following:

(a) Conduct of an inmate or other party to a civil action, of an inmate who has filed an appeal of the type described in division (A)(1)(b) of this section, or of the inmate's or other

party's counsel of record that satisfies either of the following:

(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal.

(ii) It is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

(b) An inmate's commencement of a civil action or appeal against a government entity or employee when any of the following applies:

(i) The claim that is the basis of the civil action fails to state a claim or the issues of law that are the basis of the appeal fail to state any issues of law.

(ii) It is clear that the inmate cannot prove material facts in support of the claim that is the basis of the civil action or in support of the issues of law that are the basis of the appeal.

(iii) The claim that is the basis of the civil action is substantially similar to a claim in a previous civil action commenced by the inmate or the issues of law that are the basis of the appeal are substantially similar to issues of law raised in a previous appeal commenced by the inmate, in that the claim that is the basis of the current civil action or the issues of law that are the basis of the current appeal involve the same parties or arise from the same operative facts as the claim or issues of law in the previous civil action or appeal.

(3) "Civil action or appeal against a government entity or employee," "inmate," "political subdivision," and "employee" have the same meanings as in section 2969.21 of the Revised Code.

(4) "Reasonable attorney's fees" or "attorney's fees," when used in relation to a civil action or appeal against a

government entity or employee, includes both of the following, as applicable:

(a) The approximate amount of the compensation, and the fringe benefits, if any, of the attorney general, an assistant attorney general, or special counsel appointed by the attorney general that has been or will be paid by the state in connection with the legal services that were rendered by the attorney general, assistant attorney general, or special counsel in the civil action or appeal against the government entity or employee, including, but not limited to, a civil action or appeal commenced pro se by an inmate, and that were necessitated by frivolous conduct of an inmate represented by counsel of record, the counsel of record of an inmate, or a pro se inmate.

(b) The approximate amount of the compensation, and the fringe benefits, if any, of a prosecuting attorney or other chief legal officer of a political subdivision, or an assistant to a chief legal officer of those natures, who has been or will be paid by a political subdivision in connection with the legal services that were rendered by the chief legal officer or assistant in the civil action or appeal against the government entity or employee, including, but not limited to, a civil action or appeal commenced pro se by an inmate, and that were necessitated by frivolous conduct of an inmate represented by counsel of record, the counsel of record of an inmate, or a pro se inmate.

(5) "State" has the same meaning as in section 2743.01 of the Revised Code.

(6) "State correctional institution" has the same meaning as in section 2967.01 of the Revised Code.

(B)(1) Subject to divisions (B)(2) and (3), (C), and (D) of

this section, at any time prior to the commencement of the trial in a civil action or within twenty-one days after the entry of judgment in a civil action or at any time prior to the hearing in an appeal of the type described in division (A)(1)(b) of this section that is filed by an inmate or within twenty-one days after the entry of judgment in an appeal of that nature, the court may award court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal to any party to the civil action or appeal who was adversely affected by frivolous conduct. The award may be assessed as provided in division (B)(4) of this section.

(2) An award may be made pursuant to division (B)(1) of this section upon the motion of a party to a civil action or an appeal of the type described in that division, but only after the court does all of the following:

(a) Sets a date for a hearing to be conducted in accordance with division (B)(2)(c) of this section, to determine whether particular conduct was frivolous, to determine, if the conduct was frivolous, whether any party was adversely affected by it, and to determine, if an award is to be made, the amount of that award;

(b) Gives notice of the date of the hearing described in division (B)(2)(a) of this section to each party or counsel of record who allegedly engaged in frivolous conduct and to each party who allegedly was adversely affected by frivolous conduct;

(c) Conducts the hearing described in division (B)(2)(a) of this section in accordance with this division, allows the parties and counsel of record involved to present any relevant evidence at the hearing, including evidence of the type

described in division (B)(5) of this section, determines that the conduct involved was frivolous and that a party was adversely affected by it, and then determines the amount of the award to be made. If any party or counsel of record who allegedly engaged in or allegedly was adversely affected by frivolous conduct is confined in a state correctional institution or in a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse, the court, if practicable, may hold the hearing by telephone or, in the alternative, at the institution, jail, or workhouse in which the party or counsel is confined.

(3) The amount of an award made pursuant to division (B)(1) of this section that represents reasonable attorney's fees shall not exceed, and may be equal to or less than, whichever of the following is applicable:

(a) If the party is being represented on a contingent fee basis, an amount that corresponds to reasonable fees that would have been charged for legal services had the party been represented on an hourly fee basis or another basis other than a contingent fee basis;

(b) In all situations other than that described in division (B)(3)(a) of this section, the attorney's fees that were reasonably incurred by a party.

(4) An award made pursuant to division (B)(1) of this section may be made against a party, the party's counsel of record, or both.

(5)(a) In connection with the hearing described in division (B)(2)(a) of this section, each party who may be awarded reasonable attorney's fees and the party's counsel of record may submit to the court or be ordered by the court to submit to it, for consideration in determining the amount of the

reasonable attorney's fees, an itemized list or other evidence of the legal services rendered, the time expended in rendering the services, and whichever of the following is applicable:

(i) If the party is being represented by that counsel on a contingent fee basis, the reasonable attorney's fees that would have been associated with those services had the party been represented by that counsel on an hourly fee basis or another basis other than a contingent fee basis;

(ii) In all situations other than those described in division (B)(5)(a)(i) of this section, the attorney's fees associated with those services.

(b) In connection with the hearing described in division (B)(2)(a) of this section, each party who may be awarded court costs and other reasonable expenses incurred in connection with the civil action or appeal may submit to the court or be ordered by the court to submit to it, for consideration in determining the amount of the costs and expenses, an itemized list or other evidence of the costs and expenses incurred in connection with that action or appeal, including, but not limited to, expert witness fees and expenses associated with discovery.

(C) An award of reasonable attorney's fees under this section does not affect or determine the amount of or the manner of computation of attorney's fees as between an attorney and the attorney's client.

(D) This section does not affect or limit the application of any provision of the Rules of Civil Procedure, the Rules of Appellate Procedure, or another court rule or section of the Revised Code to the extent that the provision prohibits an award of court costs, attorney's fees, or other expenses incurred in connection with a particular civil action or appeal

or authorizes an award of court costs, attorney's fees, or other expenses incurred in connection with a particular civil action or appeal in a specified manner, generally, or subject to limitations.

HISTORY:

: 142 v H 327 (Eff 10-20-87); 142 v H 1 (Eff 1-5-88); 146 v H 455. Eff 10-17-96.

APPENDIX E

FEDERAL RULES OF CIVIL PROCEDURE

III. PLEADINGS AND MOTIONS

USCS Fed Rules Civ Proc R 11 (2001)

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) **Signature**. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of attorney or party.

(b) **Representations to Court**. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) **Sanctions**. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How Initiated.*

(A) By Motion. A motion for sanctions under this rule shall be made separately from other

motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of Sanction; Limitations*. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a

penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order*. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) **Inapplicability to Discovery**. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

HISTORY: (Amended Aug. 1, 1983; Aug. 1, 1987; Dec. 1, 1993.)

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TITLE VII. GENERAL PROVISIONS

USCS Ct App 6th Cir, Cir R 46 (2001)

Cir. R. 46. Attorneys--Admission of Attorneys and Attorney Discipline

(a) Admission of Attorneys.

(1) Admission as a Prerequisite to Practice. In order to file pleadings or briefs on behalf of a party or participate in oral argument, attorneys must be admitted to the bar of this Court and file an appearance form (see form 6CA-68). If counsel for the appellant fails to secure admission and file a notice of appearance within the time specified by the clerk, the appeal may be dismissed. Any attorney representing the United States or any officer or agency thereof in an appeal will be permitted to participate in the case without the necessity of being admitted to the bar of this Court.

(2) Admission Fee. Applicants for admission to the bar of this Court shall pay a fee which shall be used for the library fund of this Court and for such other purposes as may be determined by the Judicial Council of the Sixth Circuit. Attorneys who are appointed by this Court to represent a

party in forma pauperis and who qualify under the standards of FRAP 46, attorneys employed by federal defender organization created pursuant to *18 U.S.C.* § *3006A* and attorneys presently employed by a United States court shall be admitted to practice in this Court without payment of the admission fee. For amount of fee to be paid, see 6 Cir. I.O.P. 103.

(3) Application Procedures. Admissions are made upon the motion of a member of the bar of this Court. Application for admission is made by filing the form prescribed by the clerk.

(b) Attorney Discipline.

(1) Scope. Disciplinary matters that involve members of the bar of this Court shall be governed by FRAP 46 and this rule.

(2) Conduct Subject to Discipline. This Court may impose discipline on any member who engages in conduct violating the Canons of Ethics or the Model Rules of Professional Conduct, whichever applies, or who fails to comply with the rules or orders of this Court. It may also discipline any member who has been disciplined by the state in which he or she is a member. Discipline which may be imposed pursuant to this rule includes disbarment, suspension, reprimand or such other further disciplinary action as this Court may deem appropriate and just. Nothing in this rule shall be construed as limiting in any way the exercise by this Court of its inherent contempt power or its authority under *28 U.S.C.* § § *1912* or 1927.

(3) Initiation of Disciplinary Proceedings. Formal disciplinary proceedings pursuant to this rule shall be initiated by the issuance of an order to show cause, signed by the Chief Judge or the clerk of this Court, acting at the direction of the Chief Judge.

(A) An order to show cause may be issued by this Court on its own initiative or upon complaint filed by any member of the bar of this Court, or any party before the Court. When such order is issued on the Court's initiative, no separate complaint need be filed.

(B) All complaints of attorney misconduct shall include:

(i) The name, address and telephone number of the complainant;

(ii) The specific facts that require discipline, including the date, place and nature of the alleged misconduct, and the names of all persons involved;

(iii) Copies of all documents or other evidence that support the factual allegations contained in subsection (ii), including a copy of any rule or order of this Court that is alleged to have been violated; and

(iv) At the end of the complaint, a statement made under the penalty of

perjury, indicating that the complainant has read the complaint and that the factual allegations contained therein are correct to the best of the complainant's knowledge.

(C) All complaints relating to disciplinary matters under this rule shall be filed under seal in the clerk's office. All records pertaining to disciplinary proceedings before the Court also shall be kept under seal with the clerk, unless otherwise ordered by the Chief Judge.

(D) Upon filing, the complaint shall be sent to the Chief Judge for initial review.

(i) If the Chief Judge determines that the complaint on its face or after investigation is without merit or does not warrant action by this Court, the complaint shall be dismissed by order of the Chief Judge.

(ii) If, following review, it is determined that reasonable grounds exist for further investigation, the Chief Judge may order such investigation or may issue an order to show cause if the complaint appears to be meritorious. A copy of the order to show cause, the complaint, and documents shall

be mailed to the member who is the subject of the complaint. The member shall also receive in the same mailing a copy of FRAP 46, a copy of this rule, and a written statement that the member shall have 20 days from the date of entry of the order to show cause in which to respond.

(iii) Alternatively, the Chief Judge may refer the matter to a state disciplinary board for such action as it determines is appropriate.

(4) Response. A member against whom an order to show cause is issued shall have 20 days from the date of the entry of the order in which to file a response. The response shall be filed, under seal, with the clerk, and shall contain the following:

(A) The name, address and telephone number of the respondent;

(B) A specific admission or denial of each of the factual allegations contained in the complaint and order to show cause and, in addition, a specific statement of any facts on which respondent relies, including all other material dates, places, persons and conduct relevant to the allegations of the order;

(C) All documents or other supporting evidence not previously filed with the complaint or order that are relevant to the charges of misconduct alleged;

(D) A specific request for a hearing or a statement specifically declining a hearing; and

(E) A statement made under the penalty of perjury indicating that the respondent has read the response and that, to the best of respondent's knowledge, the facts alleged therein are correct.

(5) Summary Dismissal. If the response discloses that the complaint is without merit, it may be dismissed by the Chief Judge.

(6) Conformity with State Discipline. When the respondent has been disbarred or suspended from the practice of law by a state in which the respondent practices, and the respondent admits the action complained of, or does not respond to the order to show cause, the Chief Judge may enter a final order of this Court imposing similar discipline.

(7) Judicial Officer. Upon filing of the response, the Chief Judge may appoint a circuit judge, a district judge, or other judicial officer from within the Circuit to investigate the allegations of the complaint and the response. The judicial officer shall review all sealed documents related to the disciplinary charges, conduct hearings if necessary, and issue a written recommendation.

(8) Hearings on Disciplinary Charges. A disciplinary hearing shall be held only when the member under investigation has requested such a hearing in a timely response, and the judge or the judicial officer has determined that such a hearing is necessary for the proper disposition of the charges.

(A) Notice. When it has been determined that a hearing is necessary, the judicial officer shall provide the member with written notice of the hearing a minimum of 20 days before its scheduled date. The notice shall contain the date and location of the hearing and a statement that the member is entitled to be represented by counsel, to present witnesses and other evidence, and to confront and cross-examine adverse witnesses.

(B) Procedure. The hearing shall be conducted by the judicial officer, who shall have the authority to resolve all disputes on matters of procedure and evidence which arise during the course of the hearing. All witnesses shall testify under penalty of perjury. Such hearings shall be confidential and shall be recorded. The record of the hearing shall be kept on file with the clerk, under seal.

(C) Rights of the Complainant and the Respondent. During the hearing, the respondent shall be entitled to be represented by counsel, to present witnesses and other evidence, and to confront and cross-examine

any adverse witnesses. The judicial officer may permit the complainant to participate in the proceedings also, through counsel.

(D) Burden of Proof. The respondent's violation of the Canons of Ethics, the Model Rules of Professional Conduct, or rules or orders of this Court, shall be proven by clear and convincing evidence. A certified copy of a final order of disbarment or judgment of conviction for a felony offense, entered in any state or federal court, shall be considered clear and convincing evidence.

(E) Failure to Appear. The failure of the respondent to appear at the hearing shall be grounds for discipline.

(9) Recommendation. The judicial officer shall prepare a written recommendation which includes a proposed disposition of the disciplinary charges.

(A) Filing of the Recommendation. The recommendation shall be filed, under seal, with the clerk and copies distributed to this Court and the respondent.

(B) Response to the Recommendation. The respondent shall have 10 days from the date of service of the recommendation in which to file with the clerk a written response to the recommendation. The response shall not exceed 25 typewritten pages and shall state

concisely any inaccuracies, errors or omissions which warrant a disposition other than that recommended.

(10) Final Action on the Recommendation. Within 30 days of the filing of a response to the recommendation, this Court shall enter a final order of disposition. Notice of the final order shall be sent to the respondent and the complainant.

(11) Reinstatement. Reinstatement shall be had only upon petition by the disciplined attorney. The petition shall be filed, under seal, with the clerk and shall contain a concise statement of the circumstances of the disciplinary proceedings, the discipline imposed by this Court and the grounds that justify reinstatement of the disbarred or suspended member.

(A) Automatic Reinstatement. An attorney who is suspended for a definite term shall be automatically reinstated at the end of the period of suspension, upon filing with this Court a petition for reinstatement, accompanied by an affidavit showing compliance with the provisions of the order of suspension.

(B) Petition for Reinstatement. Reinstatement of disbarred or indefinitely suspended attorneys shall not be automatic. Reinstatement of these members shall be had only upon petition for reinstatement for good cause shown. Upon the filing of such petition for

reinstatement with the clerk, the Chief Judge shall review the petition for reinstatement for clear and convincing evidence that the member has the moral qualifications, competency and learning in the law required for readmission to practice before this Court, and make a recommendation to this Court.

(C) Successive Petitions for Reinstatement. No petition for reinstatement under this Rule shall be filed within one year following an adverse determination upon a prior petition for reinstatement filed by the attorney.

(12) Designated Judge(s). The Chief Judge shall have the authority to designate a judge, or judges, of the Circuit to perform all duties imposed upon the Chief Judge by this rule. All references to "Chief Judge" in this rule shall be deemed to include such designated judge(s).